

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARY A. WHITSON</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 183,316
<b>TACO GRANDE</b>	)	
Respondent	)	
AND	)	
	)	
<b>WAUSAU UNDERWRITERS</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

On July 11, 1997, the above matter came on before the Workers Compensation Appeals Board upon the application of claimant for review of the Award of Administrative Law Judge John D. Clark dated February 20, 1997.

**APPEARANCES**

Claimant appeared by her attorney, Steven R. Wilson of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Larry Shoaf of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Steven L. Foulston of Wichita, Kansas. There were no other appearances.

**RECORD**

The record, as specifically set forth in the Award of the Administrative Law Judge, is herein adopted by the Appeals Board.

### **STIPULATIONS**

The stipulations of the Administrative Law Judge as specifically set forth in the Award are herein adopted by the Appeals Board. In addition, the parties acknowledged the resolution of the disputes between the claimant and the respondent leaving only the liability of the Kansas Workers Compensation Fund for a decision by the Appeals Board.

The issue dealing with the potential liability of the Kansas Workers Compensation Fund, while listed in the Award, was not decided by the Administrative Law Judge in his Award of February 20, 1997. The parties have stipulated that the evidence in the record is sufficient for the Appeals Board to render a decision on this issue without need for a remand to the Administrative Law Judge. Therefore, while this issue was not decided by the Administrative Law Judge the Appeals Board will take jurisdiction and decide the matter per the stipulations of the parties.

### **ISSUES**

The issues dealing with claimant's entitlement to work disability and the nature and extent of claimant's injury and/or disability have been resolved by the parties. The only issue remaining is the determination of the liability, if any, of the Kansas Workers Compensation Fund.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a long-term employee of respondent, first suffered problems with her back in August of 1989 when she was struck by a walk-in door. She notified the employer immediately and was provided medical care over a long period of time. Claimant initially received chiropractic treatment and was ultimately referred to Robert L. Eyster, M.D., an orthopedic surgeon. Claimant's problems in her back, hip, and leg have been described as degenerative arthritis, degenerative disc disease, and spinal stenosis. Respondent was aware of the injury suffered by claimant in August 1989 and provided accommodations over a period of several years to claimant as a result of her physical limitations from this injury. These accommodations are described in part by Mr. John Wylie, owner of the respondent Taco Grande, and by Ms. Connie D. McHenry, area supervisor for the respondent. Both were aware of claimant's ongoing physical problems and the fact that accommodations were necessary. Other employees were provided to help claimant with heavy lifting and with other physical tasks claimant was unable to perform. Claimant had worked for Taco Grande for almost 29 years and for the last several years had been in need of assistance to do the heavier physical aspects of the job.

Claimant testified that her back and hip condition continued to worsen during the last several years of her employment with respondent. Dr. Eyster first saw claimant in August of 1990 and the history provided to Dr. Eyster is consistent with the injury in 1989. He continued treating claimant over a period of several years diagnosing degenerative disc facet diseases and foraminal narrowing. Dr. Eyster acknowledged that claimant's condition worsened at times but was not willing to say claimant's ongoing work activities with respondent aggravated or intensified the condition. He felt the degenerative problems were the result of degenerative change and not related to her work activities.

Dr. Eyster did acknowledge that claimant's symptoms improved when he restricted her from repetitively lifting over 25 pounds. He further indicated that claimant's preexisting condition became more symptomatic before this restriction was in place. Again he did not feel any permanent impairment occurred from the work activities but, when returning claimant to work, left the 25 pound lifting restriction in place.

Claimant was also examined by Lawrence R. Blaty, M.D., who diagnosed degenerative arthritis, degenerative disc disease, and spinal stenosis. He felt the August 1989 injury perpetuated the arthritic and spinal stenosis conditions and the 1989 injury would have permanently aggravated claimant's ongoing problems. He further felt this predisposed claimant to additional problems in her lumbar spine. He opined that claimant's work and the activities associated with work continued to contribute to the degeneration although he also testified that claimant's ongoing symptomatology was a natural and probable consequence of the original injury.

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work-related injury. An employee is handicapped under the Act if the employee is afflicted with an impairment of such character as to constitute a handicap in obtaining or retaining employment. Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980). The determination as to whether a handicap exists and whether the employer has knowledge of it is a fact question and it must be made on a case-by-case basis. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 701 P.2d 336 (1985). The employer has the burden of proving it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

"Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund." K.S.A. 44-567(a)(1).

The medical evidence is somewhat contradictory in that Dr. Blaty clearly states that “but for” claimant’s preexisting problems the resulting impairment that he found in 1995 would not have occurred. Dr. Eyster on the other hand found that claimant’s work activities did not in any way contribute to claimant’s ongoing degenerative process. However, Dr. Eyster did find that claimant’s condition improved somewhat after he limited her lifting to 25 pounds or less. This lifting restriction was applicable to claimant’s work. Respondent acknowledged claimant had ongoing physical limitations and a degenerative condition which obligated respondent to assist claimant in any way possible to prevent further injury. Respondent did this in providing help to claimant with the heavy lifting over a period of several years. Dr. Blaty felt claimant suffered additional injury as a result of her work-related problems, with the work activities aggravating claimant’s preexisting conditions. Dr. Eyster felt there was no permanent aggravation from claimant’s work but his testimony is contradicted by the obvious benefit received by claimant when the lifting limitations were placed upon claimant at work. This is an indication that claimant’s work activities up to the point of the imposition of the 25-pound limitation were indeed aggravating her preexisting degenerative condition.

The medical reports and the treatment provided to claimant from 1989 forward, along with the testimony of Mr. Wylie and Ms. McHenry, show respondent had knowledge that claimant had an ongoing degenerative problem in her back and this problem would constitute a handicap in claimant’s ability to obtain or retain employment. Therefore, the Workers Compensation Appeals Board finds respondent has proven by a preponderance of the credible evidence that claimant was disabled as a result of the injury in 1989 and that this degenerative condition constituted a handicap to claimant’s ability to obtain or retain employment. The Appeals Board further finds that “but for” claimant’s preexisting physical condition the additional impairment suffered by claimant through her last day of employment with respondent would not have occurred. Therefore, the Appeals Board finds, with regard to claimant’s low back, that “but for” the preexisting handicap the resulting injury probably or most likely would not have occurred and assesses 100 percent of that liability against the Kansas Workers Compensation Fund.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the respondent, Taco Grande, and its insurance carrier, Wausau Underwriters, are entitled to reimbursement from the Kansas Workers Compensation Fund for 100% of the liability associated with the injury suffered to claimant’s low back. The specific amounts of reimbursement owed from the Workers Compensation Fund to respondent are unknown, as the details of the settlement between claimant and respondent have not been provided to the Workers Compensation Appeals Board. Should additional disputes arise regarding the amounts of reimbursement due and owing, this matter may be brought before the Administrative Law Judge for appropriate findings.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven R. Wilson, Wichita, KS  
Larry Shoaf, Wichita, KS  
Steven L. Foulston, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director